IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 176 OF 1988

1. Chandulal Balaprasad Parandekar
Since deceased by his Legal Representatives Appellants Nos.2 and 3.
2. Smt. Pramilabai Chandulal Parandekar
Age 55 years, Occupation : Agriculturist,
Residing at 385, South Kasba, Solapur.
3. Sou. Vijayalaxmi Suresh Tiwari alias Miss. Vijaya Chandulal Parandekar, Age 32 years, Occ: Household work, residing at 385, South Kasba, Solapur. ..Appellants (Org.Plaintiffs)

Vs.

1. Abdul Karim Saheblal Sayyad
Since deceased through Legal Heirs.
1a. Smt.Mahabubi Abdul Karim Sayyad
1b. Shkurshaheb Abdul Karim Sayyad
1c. Shaffik Abdul Karim Sayyad
1d. Raffik Abdul Karim Sayyad
All are residing at Gulavanchi, Taluka: North Solapur, District: Solapur

2. Allisaheb Saheblal Sayyad
Age 55, Occupation: Service.
3. Mohamadsaheb Saheblal Sayyad
Age 53, Occupation Business
4. Madhukar Nivrutti Jagtap
Age 40, Occupation: Agriculturist
5. Dattatrayk Rajaram Jagtap
Age 30, Occupation: Agriculturist.
6. Baburao Apparao Bhosale
Age 58, Occupation: Agriculturist
Nos.1 to 6 residing at

Gulvanchai, Taluka North Solapur.
7. Jagannath Narayan Shukla
Age 60, residing at 712,
South Kasba, Solapur. ..Respondents
(Org.defts. & plff. No.3)

Mr. A.V. Anturkar for appellants.
Mr. V.B. Naik with Mr. I.M. Khairdi for respndent nos.1a to 1c, 2 and 3.
Mr. V.B. Rajure for respondent nos.4 to 6.

CORAM: B.H. MARLAPALLE,J.

Reserved on : June 05, 2007

Pronounced on : August 01, 2007

JUDGMENT:

1. While admitting the second appeal by the order dated 8/4/1988, the following two substantial questions of law have been framed:-

(a) Whether, in a suit for specific performance of agreement, in order to establish the readiness and willingness, the plaintiff has to give notice to the defendant before the last date, specified in the agreement or after the last date specified in the agreement but within reasonable time thereafter?

(b) What is the true nature of suit transaction, viz. Whether it is an agreement of sale or whether it is security agreement?

2. The undisputed facts leading to the second appeal are that, the appellants-plaintiffs had filed Special Civil Suit No. 83 of 1968 for specific performance of the agreement for sale of the agricultural land in Survey No. 64 admeasuring about 50 acres and 39 gunthas situate at village Gulvanchi, Taluka - North Solapur. Defendant nos.1 to 3 are the owners of the land who had agreed to sell the land to the plaintiffs for a consideration of Rs.22,951/- and agreement for sale was executed on 20/9/1965 and an advance amount of Rs.3,500/- was paid to the defendants. There were standing crops in the land and, therefore, it was agreed that the possession of the suit land to the extent of half portion would be handed over to the plaintiffs by the end of the year 1965. On 24/9/1965 the plaintiffs paid an additional amount of Rs.5000/- to the defendant no.1 and on 14/11/1965 possession of 25 acres of the suit land was handed over to the plaintiffs in pursuance of the part performance of the agreement for sale. The plaintiffs

served a notice dated 5/4/1966 calling upon the defendants to execute the sale deed and in response thereto on 28/5/1966 the defendants executed a supplementary agreement for sale after accepting Rs.500/- and the possession of the remaining land was also handed over to the plaintiffs. Thus the plaintiffs paid an amount of Rs.6000/- as part payment and came in possession of the total suit land. It was the case of the plaintiffs that they found some encumbrances to the extent of Rs.5000/- and after deducting that amount the balance amount from the total consideration came to Rs.11,951/-. On payment of the said balance amount the defendants were to execute the sale deed within 15 days. The plaintiffs claimed that they were ready to perform their part of the contract but the defendants evaded to execute the sale deed and, therefore, the plaintiffs filed Special Civil Suit No. 83 of 1968 on or about 6/9/1968. Prior to filing of the suit the plaintiffs were illegally and high-handedly dispossessed of the suit land by the defendants and during the pendency of the suit the defendant nos.1 to 3 sold the suit land to defendant nos.4 to 6. The plaintiff no.1 died during the pendency of the suit and his daughter was brought

on record as plaintiff no.4 in addition to his wife plaintiff no.2.

. The defendants contested the suit. Defendant No.1 filed Written Statement at Exh.15 and the same was adopted by the defendant nos.2 and 3 by filing pursis at Exh.16. The defendant nos.4 and 5 filed their Written Statement at Exh.17 and the defendant no.6 filed Written Statement at Exh.79. Defendant nos.1 to 3 admitted execution of the agreement dated 20/9/1965 but claimed that it was by way of security and it was not an agreement for sale. They further claimed that the supplementary agreement dated 28/4/1966 was also by way of security for interest without receiving any amount. They further stated that they had parted with the possession of the suit land and the names of plaintiff nos.2 and 3 were subsequently added by the plaintiff no.1 in these agreements. The defendant nos.4 and 5 who were subsequently impleaded, admitted that they had purchased from defendant no.1, 25 acres of the suit land on 10/7/1978 and they were bonafide purchasers and did not have the knowledge about the transaction between the plaintiffs and defendant nos.1 to 3. The

consideration for the sale transaction to defendant nos.4 and 5 is Rs.12,000/- whereas the consideration for the sale transaction to defendant no.6 is Rs.8000/-, thus making a total of Rs.20,000/- as the sale price for the entire suit land of 50 acres and 39 gunthas as against the total consideration of Rs.22,951/- agreed between the plaintiffs and defendant nos.1 to 3, way back in 1965.

3. The agreement for sale dated 20/9/1965 is at Exh.85, whereas the supplementary agreement dated 28/4/1966 is at Exh.86. The agreement for sale between defendant no.6 and defendant nos.1 to 3 was executed on 8/5/1968 and the same was registered (Exh.105), whereas the sale deed was signed on 18/9/1968 and registered on the next day (Exh.107). On behalf of the plaintiffs, plaintiff no.3 Jagannath Narayan Shukla (PW 1), plaintiff no.2 Pramilabai Chandulal Parandekar (PW 2) were examined, whereas for the defendants, defendant no.1 - Abdul Karim (DW 1) was initially examined at Exh.101 and was also examined at Exh.121. In addition, defendant no.6 Baburao was examined as DW 2. It appears that none appeared for defendant nos.4 and 5, whereas Allisaheb

Saheblal Sayyad - defendant no.2 was examined at Exh.123. On appreciation of the oral and documentary evidence adduced by the parties, the trial court held that the agreement at Exhs.85 and 86 were not agreement for sale, but, in fact, they were signed by way of security, the plaintiffs could not prove that they were put in possession of the suit land on execution of these agreements and the plaintiffs were not entitled for specific performance and recovery of possession. On the issue of the plaintiffs being ready and willing to perform their part of the contract, the trial court held that the said issue did not survive. A specific issue was framed, whether the sale of the suit property by defendant nos.1 to 3 to defendant nos.4 to 6 was hit by the doctrine of lis pendente lite under Section 52 of the Transfer of Property Act and it was answered in the affirmative by noting that the suit was filed on 26/8/1968, half of the land was sold to defendant no.6 on 18/9/1968 and the remaining was sold to defendant nos.4 and 5 on 10/7/1978, though the agreement for sale in favour of these defendants was signed initially on 19/5/1975 and subsequently on 29/6/1977 as stated in the Written Statement at Exh.74. The trial court partly decreed

the suit in the following terms:-

> "The plaintiffs are entitled to recover Rs.6000/- (Rupees Six Thousand only) from the Defendants Nos.1 to 3 jointly and/or severally, together with interest thereon at the rate of Rs.6% per annum from the date of the decree to the date of payment.
>
> The claim of the plaintiffs with respect to specific performance of the contract shall stand dismissed."

. On the issue of the defendant nos.4 to 6 being bonafide purchasers, the trial court held against them by referring to the depositions of DW 1. In his cross examination DW 1 had clearly admitted that while selling the land to the defendant nos.4 and 5 he had informed them regarding the pendency of the suit with respect to the suit land. At the same time, he did not admit that he had disclosed this fact to defendant no.6, but the defendant no.6 in his depositions had stated that prior to purchase of the suit land, he had ascertained regarding the ownership of the defendant

no.1.

4. The Lower Appellate Court, while reappreciating the evidence recorded before the trial court agreed with the findings of the trial court about the agreements dated 20/9/1965 and 28/4/1966 signed between the plaintiffs and the defendant nos.1 to 3, but it held that the plaintiffs could not prove that they were always ready and willing to perform their part of the contract. It further held that the defendant nos.4 to 6 were bonafide purchasers for value, but they had no notice about the agreement of sale in favour of the plaintiffs. On the issue of lis pendency, the Lower Appellate Court held that the sale transactions between the defendant nos.1 to 3 on one hand and the defendant nos.4 to 6 on the other hand were hit by lis pendente lite. However, it further proceeded to hold that the agreements at Exhs.85 and 86 were not with the intention to deal with the suit land, but it was only for the purpose of collateral security to the loan advanced and, therefore, it would not affect the sale deeds in favour of defendant no.4 to 6. It confirmed the decree of the trial court and dismissed the appeal.

5. The first substantial question of law framed in this second appeal is based on the findings recorded by the Lower Appellate Court against the plaintiffs on issue no.2, which reads as under:-

> "Do the plaintiffs prove that they were always ready and willing to perform their part of the contract?"

. The Lower Appellate Court noted that as per the terms of the agreement at Exh.85 the sale deed was to be executed by 23/3/1966 and the plaintiffs issued the notice (Exh.87) to the defendant nos.1 to 3 to execute the sale deed on 5/4/1966 i.e. after 23/3/1966. The Lower Appellate Court, therefore, held that the notice at Exh.87 having been issued after the period of executing the sale deed was over, it cannot be held that the plaintiffs were ready and willing to perform their part of the contract. The Lower Appellate Court stated,

> "....It was necessary for the plaintiffs to prove that before 23/3/1966 they were ready and willing to get the sale deed executed in

terms of the agreement of sale but there is no evidence to prove that plaintiffs were ready and willing to perform their part of contract before 23/3/1966 (Chaitra Shudha 1 Shake 1888) when the plaintiffs had sufficient consideration in their hand to make the payment of the entire price of the land and when there was no difficulty for the defendant nos.1 to 3 to dispose of the land, it is not explained why the supplementary agreement was got executed instead of getting the sale deed executed. The postponement of the sale-deed to which the plaintiffs gave consent clearly suggests that the parties were in fact not intending to execute the sale-deed. The plaintiffs have, thus failed to prove that they were ready and willing to perform their part of contract of getting the sale deed executed within the time limit provided in the earlier agreement of sale."

6. One additional substantial question of law was also argued and it requires consideration. The same is framed as under:-

(c) If the sale transactions executed in favour of defendant nos.4 to 6 during the pendency of the suit were hit by the doctrine of lis pendente lite, could the transfer of the suit land to defendant nos.4 to 6 be held to be illegal and void ab initio?

. In this regard I may safely rely upon the decision in the case of Santosh Hazari vs. Purushottam Tiwari (Deceased) by Lrs. **[(2001) 3 SCC 179]**. A three Judge Bench of the Apex Court in the said case stated, inter alia, as under:-

> "....In spite of a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied: (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its such satisfaction."

7. Section 58 (c) of the Transfer of Property Act is regarding mortgage by conditional sale and it reads as under:-

"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.---

(a) .....

(b) .....

(c) Mortgage by conditional sale.- When the mortgagor ostensibly sells the mortgaged property -

. on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

. on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be

deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

. Mr. Anturkar the learned counsel for the appellants submit that the contents of the documents at Exhs.85 and 86 did not speak of any mortgage by conditional sale nor did they speak of any security for the loan, if any, advanced by the appellants. He alleged that the defence of security was taken only by way of an after thought and to get out of the clutches of Section 58(c) of the Transfer of Property Act, 1882. He relied upon the decision in the case of Umabai and anr. vs. Nilkanth Dhondiba Chavan (Dead) By LRs and anr. **[(2005) 6 SCC 243]**. The Apex Court held that true nature of the transaction must be determined having regard to the intention of the parties as well as the circumstances attributing thereto as also the wording used in the document in question. Keeping in mind this ratio, it is necessary to consider the contents of Exhs.85 and 86.

. The agreement at Exh.85 was signed on

20/9/1965 and in its preamble it is stated that the suit property had become the personal property of the vendors i.e. the present defendant nos.1 to 3 by way of the order dated 16/8/1963 passed by the Mamlatdar of North Solapur. It proceeded to state that the said property was being offered to the plaintiffs by way of sale at the rate of Rs.450/- per acre. By way of advance, an amount of Rs.3,500/- was received and the remaining amount of Rs.19,451/- would be paid at the time of signing the sale deed. The defendants had agreed that the sale deed will be signed by Chaitra Shudha 1 Shake 1888 or around that time. The agreement for sale would be binding on the successor of the vendors. Out of the total land of 50 acres 39 gunthas, 25 acres of land was having the crops of groundnuts and toor and those crops would be harvested and possession would be given by the end of November, 1965. The possession of the remaining land would be handed over to the plaintiffs on execution of the sale deed. In this document there is no mention of any security for any loan transaction. The document did not even whisper about the loan being given by the plaintiffs at the request of the defendant nos.1 to 3. At the end of this document there is an endorsement

made on 24/11/1965 to the effect that an additional amount of Rs.2000/- was received by the defendant nos.1 to 3 on that day as the amount was required to be paid for the acquisition of house plot and purchase of buffaloes. It was further stated that the said amount of Rs.2000/- would be adjusted against the balance of Rs.19,451/- and the remaining amount of Rs.17,451/- would be given while executing the sale deed and the sale deed would be executed within the time originally specified. Coming to the supplementary agreement at Exh.86 and signed on 28/4/1966, there is no whisper about any loan transaction or a security for such a transaction. The document is clearly titled as a supplementary agreement for sale. It further states that the suit land had an encumbrances of additional Rs.5000/- which was to be discharged by the plaintiffs and balance amount of Rs.11,951/- was to be paid by the plaintiffs at the time of execution of the sale deed. By no stretch of imagination these two agreements at Exhs.85 and 86 could be termed as and by way of security for a loan transaction. This defence was taken by way of an after thought when the suit was filed and beyond the oral statement made in the depositions of defendant

no.1, there is not even an iota of evidence to hold that these agreements were by way of security for a loan transaction. As observed by their Lordships in the case of Umabai (Supra) and as is the well established position in law that the agreements have to be read as it is and if so read it is clear that the agreements at Exhs.85 and 86 were the agreements for sale and the concurrent findings recorded by both the courts below that they were by way of security against loan transaction are unsustainable. It is a perverse finding by both the courts below.

8. Section 52 of the Transfer of Property Act, 1882 clearly states that the property cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party thereto during the pendency, in any court, of a suit. Both the courts below have held that the transactions of sale in favour of defendant nos.4 to 6 are hit by the doctrine of lis pendente lite but the Lower Appellate Court held that as the agreements at Exh.85 and 86 were merely a security for loan transaction, the sale of the suit land in favour of defendant nos.4 to 6 during the pendency of the suit would not be

affected and thus would not come within the ambit of Section 52 of the Transfer of Property Act, 1882. This finding is patently erroneous and more so when the finding of the courts below regarding the nature of the said agreements has been discarded in this second appeal. It is clear that the sale transactions by defendant nos.1 to 3 in favour of defendant nos.4 to 6 were intended to defeat the claim of the plaintiffs in the suit and the suit property could not have been transferred in favour of defendant nos.4 to 6 during the pendency of the suit filed by the plaintiffs. The finding recorded by the Lower Appellate Court that the defendant nos.4 to 6 were not aware of the agreements between the plaintiffs on one hand and the defendant nos.1 to 3 on the other hand, cannot be accepted having regards to the oral evidence of DW 1 and DW 6. The Lower Appellate Court was not right in turning down the findings on this issue recorded by the trial court. Even otherwise, during the pendency of the suit the defendant nos.1 to 3 were estopped from transferring the suit land in view of the embargo of Section 52 of the Transfer of Property Act, 1882 and, therefore, the sale deeds in favour of defendant nos.4 and 5 and defendant no.6 executed by

defendant nos.1 to 3 are required to be held as illegal. In the case of Sarvinder Singh Vs. Dalip Singh **[(1996) 5 SCC 539]**, on the interpretation of Section 52 of the Transfer of Property Act, 1882, it has been held as under:-

> "It would, therefore, be clear that the defendants in the suit were prohibited by operation of Section 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the appellant except with the order or authority of the court. Admittedly, the authority or order of the court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lis pendens by operation of Section 52. Under these circumstances, the respondents cannot be considered to be either necessary or proper parties to the suit."

9. On the issue of the plaintiff being ready and willing to perform their part of the contract, the

trial court held that the said issue did not survive on account of the findings recorded in issue nos.1 and 17, which read as under:-

ISSUE	FINDING
(1) Do defendants prove that the Sathe Khat dated 20-9-1965 was not to be acted upon as such but was to be taken as a security of the amount?	Yes.
(17) Whether it is proved that the defendants had agreed to sale the suit land to the plaintiffs for consideration of the suit?	Not proved

. The Lower Appellate Court framed Issue No.2 as to whether the plaintiffs had proved that they were always ready and willing to perform their part of the contract? The said issue has been answered in the negative for the reasons set out in para 24 of its judgment by the Lower Appellate Court, as quoted hereinabove in para 5. As per the Lower Appellate Court it was necessary for the plaintiffs to prove that before Chaitra Shudha 1 Shake 1888 which means 23/3/1966, they were ready and willing to get the sale

deed executed in terms of the agreement for sale and that there was no evidence to prove the same. Whether this reasoning could be legally accepted is to be decided. Admittedly, as per the agreement for sale at Exh.85, the sale deed was to be executed by 23/3/1966 and obviously if it was not so done on account of any reason attributable to any of the parties, the question of one party calling upon the other unwilling party by a legal notice would arise and there would not be any occasion to issue the legal notice by any of the parties before 23/3/1966 and in the instant case the supplementary agreement for sale at Exh.86 was signed on 28/4/1966. As the agreement was not singed by 23/3/1966 the plaintiffs have issued legal notice dated 5/4/1966 to the defendant nos.1 to 3 calling upon them to execute the sale deed which indicated that the notice was issued at the earliest after the dead-line for signing the sale deed was over. In response to the said notice the defendant nos.1 to 3 held fresh negotiations with the plaintiffs and the supplementary agreement for sale at Exh.86 was signed on 28/4/1966 and, therefore, the findings recorded by the Lower Appellate Court are manifestly erroneous. In the instant case, the plaintiffs were

required to give notice after 23/3/2006 and not before that and such a notice was given on 5/4/1966. The notice was not required to give before the last date fixed for signing the sale deed i.e. 23/3/1966. The cause of action to issue the notice will arise only when either of the parties failed to execute the sale deed by the date mentioned in the agreement for sale. The substantial question framed at (a) in para 1 above is answered accordingly. It is, therefore, held that the plaintiffs have proved that they were always ready and willing to perform their part of the contract with the defendant nos.1 to 3 for signing the sale deed consequent to the agreements for sale at Exh.85 and 86.

10. The question whether the relief of specific performance of the contract for the purchase of immoveable property should be granted or not always depends on the facts and circumstances of each case and the court would not grant such a relief if it gives the plaintiff an unfair advantage over the defendant as has been held in the case of Mrs.Sandhya Rani Sarkar vs. Smt. Sudha Rani Debi and ors. **[AIR 1978 SC 537]**. The trial court, as noted earlier,

recorded a finding that defendant nos.4 and 5 were not the bonafide purchasers and so far as the defendant no.6 is concerned, it held that he had purchased part of the suit land after ascertaining the ownership of defendant no.1. The trial court also noted that all the defendants were from the same village with a population of 1582. The trial court further stated that it was not inclined to hold that the defendant nos.4 to 6 paid their money in good faith and without notice of the original contract. The trial court has not recorded a finding on the issue that the plaintiffs would derive an unfair advantage if the relief of specific performance of contract was granted in their favour. However, it proceeded to consider the alternative prayer set out in the plaint for compensation and held that the plaintiffs were entitled to recover Rs.6000/- from the defendant nos.1 to 3 jointly and/or severally together with interest at the rate of 6% p.a. from the date of the decree till the date of payment. The recent 7x12 extract copies placed before me in respect of the suit land do indicate that all along during the pendency of the instant proceedings the defendant nos.4 to 6 have been in possession thereof and they have been cultivating

the same for the last about 40 years.

11. During the last four weeks this second appeal was listed before the court and the learned counsel for both the parties were called upon to obtain instructions regarding the present market value of the suit land. The plaintiffs appeared and stated that the present market value is Rs.5000/- per acre, whereas the respondents could not ascertain the present market value. Both the parties admitted that though the suit land is not irrigated land and most of it is a fallow land, it is located at a distance of 20 Kms. from the Solapur Municipal Corporation area. As is well known even a dry land could be brought under cultivation for horticulture and Solapur District is well known for horticulture growth during the last about 20 years or so. At the same time, the defendant nos. 4 to 6 have been in possession of the suit land for the last about 40 years and, therefore, the plaintiffs will have to pay them compensation amount to execute the sale deeds and part with the possession of the land. I, therefore, deem it appropriate to fix the present market value of the suit land at Rs.10,000/- per acre.

12. In the premises, the second appeal is hereby allowed and the decree of the trial court as confirmed by the Lower Appellate Court is hereby substituted as under:-

(a) The suit is decreed. The plaintiffs are entitled to get the decree of specific performance of the contract (Sathe Khat dated 20/9/1965 and the Supplementary Sathe Khat dated 28/4/1966) executed in their favour.

(b) By way of specific performance of contract the plaintiffs at the first instance shall be entitled to receive the possession of the suit land from defendant nos. 4 to 6 by paying them a compensation at the rate of Rs.10,000/- per acre and the said defendants in turn shall execute the sale deeds jointly and/or severally in favour of the plaintiffs immediately on receipt of the compensation amount. The plaintiffs shall pay the compensation within two months from today.

(c) In case the plaintiffs jointly and/or severally fail to pay the compensation of Rs.10,000/- per acre to the defendant nos. 4 to 6 within the stipulated period of two months, the said defendants shall pay an amount of Rs.10,000/- per acre to the plaintiffs within a period of two months therefrom so as to confirm their ownership over the suit land.

(d) The land shall be used for self cultivation or horticulture.

(e) Costs in cause.

. Fresh decree be drawn in the above terms by the Registry and forward the same to the trial court for its execution.

(B.H. Marlapalle,J.)